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Abstract:

One of the most persistent controversies in law is related to its completeness or incompleteness. In the context of the debate between inconclusive law or the completeness of the law, the main argument of the paper is that Hans Kelsen paradoxically converges with Ronald Dworkin in denying legal indeterminacy, and albeit from radically different and opposing positions, both of them would arrive at the same conclusion in the discussion about completeness or incompleteness in the law: the law is 'complete'. Both advocate a position contrary to HLA Hart.

THE CONTROVERSIES ABOUT LEGAL INDETERMINACY AND THE THESIS OF THE 'NORM AS A FRAMEWORK' IN KELSEN

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1. INTRODUCTION

Roughly speaking, the law is *complete* when within the universe of *foreseen* (real) and *unforeseen* (possible) cases, *all* are envisaged by the legal system in their full scope. Fullness or completeness is synonymous with 'regulation' or 'deontological qualification' and its consequence on implementation and interpretation is the absence of legal *indeterminacy*. An action or situation is 'regulated' –and consequently 'determined'– in a legal system if there is a rule or principle belonging to this system that qualifies the action or system. Thus, law is declared to have fullness or completeness when it provides a legal qualification in every specific case for *every* action or situation, real or possible.[1] On the other hand, the law is *inconclusive* when it does not contemplate a specific solution for each and every given case.

There are three areas that can provide information on whether the law is or isn't *complete*: the criteria of legal validity; the rules and principles of law; and judicial decisions. In this text I will refer to the question of fullness or incompleteness in relation to the *rules* and *principles* of law, as well as the influence of the aforementioned positions on legal interpretation (judicial decisions). To this end I will take into account canonical legislative formulations (rules), but also the *implicit* content of legislation (principles); in other words, both statutory law and the law implicit in statutory law.

As mentioned by Rafael de Asís, the problem under discussion can be approached synthetically as follows: we begin with the fact that it's obviously difficult to believe that the legal system has sufficient rules to solve all conflicts, even though the legal system is obliged to view the law as something capable of providing solutions to all problems that may arise. Fullness is therefore a kind of *ideal* view of the law to be pursued by legal practitioners who should act as if the legal system were complete. This allows us to distinguish two senses of the term 'fullness' *(completeness*) of the law: an *absolute* and a *relative* sense. From the 'absolute' point of view fullness is associated with the existence of norms that solve, as it were, all problems. From the 'relative' point of view, the absence of specific norms for solving certain problems is accepted, but (at the same time) so is the existence of mechanisms that integrate these problems into the legal system.[2] In both senses (absolute and relative), the law is full and complete.

In this respect, of the three cases that diminish the occurrence of fullness or incompleteness of the law, it is only the absence of a norm with a precise solution and (furthermore) the impossibility of finding a solution through various techniques that would allow us to say in the strict sense that 'fullness has deteriorated'. The other two cases (the existence of a norm that provides a precise solution to the problem –in a legal dispute–; and the absence of a norm with a precise solution, but the possibility of reaching a solution through various techniques) would not constitute cases of incompleteness of the law.[3]

From the above we can infer that the fullness or completeness of the law is assessed according to the following criteria:

Firstly, the ability of the rules and principles to cover any *actual* or *possible* (future) case that presents itself within the legal system. If the rules and principles apply to *any* actual or possible case, they constitute a *factor* of the completeness of the legal system. If the opposite

[1] Mª Cristina Redondo, 'Teorías del Derecho e Indeterminación Normativa' (1997) 20 Doxa 180 ff.
[2] Rafael de Asís Roig, *Jueces y normas. La Decisión Judicial desde el Ordenamiento* (prologue by G Peces-Barba, Marcial Pons 1995) 29 and 32.
[3] ibid 32 ff.

is the case, the law lacks fullness.

And secondly, for the law to be full or complete, its rules and principles must 'regulate or contemplate in *all* their scope' those cases which they cover, without leaving *any* aspects of these cases indeterminate. If this is the case, and the rules and principles extend their application to '*any* aspect' of the cases they relate to, this favours the completeness of the law; if they do not, they affirm incompleteness as a characteristic of inconclusive law.

In section two of the paper I will briefly describe the conceptual context, in the sphere of legal theory, in which the debate on the indeterminacy or completeness of the Law is developed. In section three I will refer to this discussion in the area of adjudication. In addition to the above, in sections four and five I will discuss the doctrine of the norm as a framework and the thesis of indeterminacy in Kelsen. And I will conclude, as a central argument of the paper, that whilst Kelsen paradoxically converges with Dworkin in denying legal indeterminacy set out from opposing positions and moving in different directions, both of them would arrive at the same conclusion that the law is 'complete': both theories include a thesis of the completeness of the law against the position of Hart.

2. INCONCLUSIVE LAW OR THE COMPLETENESS OF THE LAW

Approaches to inclusive law or the completeness of the law vary according to the various *theories of law* and of the *legal argument* used.

Thus, the *completeness* of law is discussed by contemporary legal positivism with the idea that the law is indeterminate because it is incomplete, as it is impossible for it to regulate the entire universe of *foreseen* (real) and *unforeseen* (possible) cases. Consequently, *not* all legal controversies that judges must resolve can be solved through established law, but rather sometimes (partial indeterminacy) or always (complete indeterminacy) the judge must use his powers of discretion to resolve a particular case.[4] Positivists believe that this conceptual framework –which includes a significant thesis on legal indeterminacy– receives the greatest support when *testing the suitability* of legal theory to the practice of law.[5]

In this debate, an argument that has increasingly gained favour in determining the fullness or incompleteness of the law is related to the explanations given by various legal theories as to why *genuine disagreements* occur between jurists in a legal case. As Albert Calsamiglia rightly states, one of the fundamental characteristics of the legal profession is *controversy*; jurists discuss and have numerous disagreements about the solutions offered by positive law, and yet very few theories have paid attention to the analysis of these disagreements.[6] However, the genuine disagreement between jurists involved in a legal case, in terms of legal reasoning, has been explained primarily from two points of view: firstly, from the fundamentals of law applicable to the particular case ('theoretical disagreement'); and secondly, from the question of whether or not these fundamentals are in fact satisfied in a particular case ('empirical disagreement').[7]

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[4] cf Marisa Iglesias Vila, 'Discreción Judicial y Positivismo Jurídico: Los Criterios Sustantivos de Validez', in Roberto Saba (ed), *Estado de Derecho y democracia. Un Debate Acerca del Rule of Law* (Sela 2001) 92; cf also Marisa Iglesias Vila, *El problema de la discreción judicial. Una aproximación al conocimiento jurídico* (CEPC 1999) Chapter I.

[5] cf Juan Alberto del Real Alcalá, 'Ámbitos de la Doctrina de la Indeterminación del Derecho' (2006) 56 Jueces para la Democracia 48-58.

[6] Albert Calsamiglia, 'El Concepto de Integridad en Dworkin' (1992) 12 Doxa 159 ff; also Albert Calsamiglia, 'Ensayo sobre Dworkin', in Ronald Dworkin, *Los Derechos en Serio* (Ariel 2005) 7-29.

[7] Ronald Dworkin, *Law's Empire* (Hart Publishing 2000) 4-6.

The main explanation supplied by legal positivism is *empirical* and is directly related to: a) the notion of 'open texture' in law; b) the consideration of 'borderline cases' in the legal system; and c) the *significant* affirmation of (partial or complete) indeterminacy of the law. *Borderline* cases (doubtful, indeterminate or marginal cases) must be taken into consideration, as must those legal cases that involve indeterminacy at the moment of application and interpretation, whether in all legal controversies (if it is believed that the law is *always* indeterminate) or only in some of them (if it is believed that the law is *sometimes* indeterminate). In other words, the mechanisms of legal interpretation that may be able to solve borderline cases will either never be able to solve them (complete indeterminacy) or sometimes will and sometimes won't (partial indeterminacy).

One legal positivist has been most successful in explaining genuine disagreements between jurists: Hart, with his notion of the *open texture* of the law,[8] which arrives at the conclusion that the genuine disagreement between jurists is an '*empirical* disagreement'. Thus, when jurists must apply a legal term to a particular case, genuine disagreement arises because this particular case has fallen into the *twilight zone* of the area in which the *paradigm* case of a legal term can be applied. This generates *subjective uncertainty* or *doubt* (which may lead to legal indeterminacy) as to whether the particular case falls *within* or *outside of* the area of clear application or clear non-application. The result in this case is that the legal term is 'indeterminate' within the legal system, which consequently lacks fullness and is inconclusive. The disagreement or dispute is an *empirical* one because it centres on the act of *applying* (qualifying) a legal concept to a *particular* case. It is true, as Jules Coleman warns, that if we pay too much attention to the genuine controversies between jurists when resolving the issue of fullness or incompleteness we may end up understanding law exclusively in terms of *litigants* and judges, and overlook the important role of law as a 'guide' for citizens.[9]

In opposition to the current positions of legal positivism, the contemporary anti-positivist approach, as developed by Lon L Fuller and Dworkin, uses two core arguments to support the fullness of the law: a) the radical statement that the *implicit contents* of the law are *integrated* into the judicial sphere, and that these implicit contents avoid legal indeterminacy by producing an '*ex post* determinacy' of law in relation to any given legal case, whether in relation to the explicit law of rules or the implicit law of principles;[10] b) the 'argument of controversy' in response to the question as to why genuine disagreements arise between jurists.

The anti-positivist theory of Fuller already provided an argument in favour of *implicit* law.[11] Fuller also uses other arguments in the field of constitutional law to explain why a *theory on the sources of law* must include implicit law:

(i) because the drafting of any Constitution would be impossible unless the writer can assume that the legislator will agree to accept certain implicit notions;[12]

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[8] HLA Hart, *The Concept of Law* (2nd edn, Clarendon Press 1994) 124-136.

[9] Jules Coleman, *The Practice of Principle: In Defense of a Pragmatist Approach to Legal Theory* (OUP 2001) 166 ff.

[10] cf Juan Alberto del Real Alcalá, '¿Certeza del Derecho *vs.* Indeterminación Jurídica? El Debate entre Positivistas y Anti-Positivistas' (2007) 106 Archiv für Rechts-und Sozialphilosophie, *Beiheft* 94-106.

[11] Lon L Fuller, *The Anatomy of Law* (Frederick A Praeger Inc 1968) 44, 48 and 57: in the law or in legal provisions there is always a substratum of implicit law.

[12] ibid 63.

(ii) because it is necessary to anticipate emergency situations, and to foresee the necessary modifications in order to confront such situations;[13]

(iii) another reason why a written Constitution cannot avoid assuming implicit principles on the integrity of the law that cannot be formulated is that the words of a Constitution must be interpreted before they can be applied. Fuller talks of the 'implicit sources' of law, which are derived from the uses, practices, community attitudes and a sort of consensus in relation to them, which allows the law to cover the whole range of cases the judge is presented with, and to do so to their full extent.[14]

Given that for Dworkin the legal norm is an ideal more noble than the norm of a legal text, only a theory on the sources of law as described above (that includes implicit law) can allow the rules and principles to *cover* any legal case, in such a way that the judge is able to *determine* the 'demands' of the law in *every* legal dispute.[15] For citizens, this would make it possible for every one of them to have rights and duties in relation to other citizens and in relation to their government, even when not all of these rights and duties are codified and written down in books.[16] This leads him to reject the positivist claim that if a legal dispute is not regulated by *explicit* law it is because the law is indeterminate. From this anti-positivist approach, a legal system will always have rules and/or principles (identified and determined by the criteria of legal validity) that are able to contemplate any problems of any case that presents itself to the legal system. This means that any legal dispute can always be resolved –and to its full extent– by the law, and that the law is therefore complete.

This position depends largely on the 'argument of controversy' as an explanation of *genuine disagreements* between jurists. In fact, modern anti-positivism resolves this issue in such a way that, through interpretation, rules and principles can be determined for every real or possible case. This is the case even where these rules and principles include *imprecise* terms that may at first appear to generate indeterminacy in their application to a particular case. Thus, in contemporary anti-positivism the *argument of controversy* constitutes a factor of the completeness of law in relation to rules and principles, and in the two following senses:

a) In relation to the 'disputed' nature (as opposed to open texture) of law, and the Dworkian distinction between the *concept itself* (legal) and *conceptions* (of the concept).[17] One should bear in mind that Dworkin, in opposition to the 'open texture' nature of law described by Hartian legal positivism, claims that the law (rules and principles) is always 'determinable' (for every case) even when it is 'disputed'. This means that any problem in law dealt with by legal practitioners that is initially indeterminate can always be resolved by the mechanisms of legal interpretation and integration.[18]

There is a prior reasoning that underlies the anti-positivist explanation as to why jurists disagree. It is crucial to understand that when the argument of *controversy* distinguishes between a 'concept' (legal) and 'conceptions' (of the concept) it is not referring to the difference between the *meaning* of a legal term that is part of a norm and its empirical

[13] ibid 65.
[14] ibid 58-59 and 66.
[15] Ronald Dworkin, *Taking Rights Seriously* (2nd edition, Duckworth 2002) 339.
[16] ibid 339-342.
[17] Ronald Dworkin, 'Thirty Years On' (2002) 115 Harvard L Rev 1655 ff.
[18] Dworkin, *Taking Rights Seriously* (n 15) 128 ff; also cf Juan Igartua Salabarría, 'El Indeterminado Concepto de los Conceptos Indeterminados' (2000) 56 Revista Vasca de Administración Pública 151 ff; Walter Bryce Gallie, 'Essentially Contested Concepts' (1995-1996) 56 Proceeding of the Aristotelian Society 167-198 who originally defined concepts that invoke conceptions as 'essentially disputed concepts'.

application (extension) or non-application to a given case. Rather, the distinction is a 'conceptual', theoretical one concerning *differing conceptions* (of a theoretical/doctrinal nature) that each of the parties have in a legal dispute in relation to the term or legal concept included in the norm that the legal practitioner is interpreting. In other words, the argument centres on the distinction between the 'abstract idea (or conception)' and the 'specific idea (or conception)' that the legal practitioner applies to the legal term in order to particularise the abstract idea in a given case.[19]

Therefore, the reason why genuine disagreements occur between jurists is not, as the positivists wrongly claim, because the legal terms or concepts under discussion (as to whether they should or shouldn't be applied in a particular case) have an *open texture* and are therefore *indeterminate*. They occur because such legal terms are 'abstract' concepts. And in order for the abstract concepts contained in a rule or principle to be applied to a *specific* case, it is not enough to simply observe the facts and subsume them under some applicable *paradigm*; but rather a particular 'conception' of the legal concept must be developed in relation to the given case. In short, the key to explaining legal controversy is the fact that each party to the dispute develops a '*different* conception' of the *same* legal term. This is where legally controversy truly derives from.

In fact, Dworkin classifies abstract *concepts* (those that necessarily require a particular theoretical/doctrinal *conception* in order to be applied) as 'disputed' concepts. Of course, to say that a concept is *disputed* does not in any way imply that the concept is *vague* and *indeterminate*.[20] In fact, disputed concepts are not *indeterminate* but simply *subject to litigation*: the parties dispute over their specific meaning in a given legal case.

b) In view of the above, the *argument of controversy* that states that in legal disputes there is a theoretical disagreement between jurists regarding the conception of legal terms, and not an empirical disagreement regarding their application, represents, for anti-positivists, an important factor in the completeness of the law in relation to rules and principles. In fact, according to Calsamiglia, the argument of *disagreement between jurists* is the Dworkian anti-positivists most potent weapon for challenging contemporary positivism: if jurists agree on which laws are in force, and agree on the meaning of the wording of the law, theoretical disagreements about what the law demands (in each case) can and do arise.[21]

The conclusion is that, from a contemporary anti-positivist –and especially Dworkian– point of view, the controversies between jurists are 'interpretative' and can therefore be resolved through the methods of interpretation afforded by the legal system. Consequently, these controversies do not imply any legal indeterminacy.[22]

3. COMPLETENESS, INDETERMINACY AND ADJUDICATION

The issue of whether or not the law is complete or incomplete has an impact on how judges approach the task of legal interpretation. They can either accept the thesis that cases which are (partly or completely) 'non-regulated', and the rights and duties of citizens that are

[19] Dworkin, *Law's Empire*, (n 7) 71.
[20] For Timothy Endicott, the 'abstract' concepts that Dworkin speaks of are 'vague' concepts. See Timothy AO Endicott, 'Herbert Hart and the Semantic Swing' (1998) 4.3 Legal Theory 283-300.
[21] Calsamiglia, 'El Concepto de Integridad en Dworkin', (n 6) 160: Dworkin would suggest that the law is an interpretative concept and that texts say nothing in and of themselves. A particular approach is required and that is what positivism has not understood.
[22] Dworkin, *Law's Empire*, (n 7) 71, 37-44 and 87-90; and Marisa Iglesias Vila, 'Los Conceptos Esencialmente Controvertidos en la Interpretación Constitucional' (2000) 23 Doxa 101.

argued over judicially, are *ineradicably* indeterminate, meaning that the law is an inconclusive system. Or they can preserve their decision-making capacity through interpretative methods and rules of construction that always and in every case resolve the initial indeterminacy, meaning that the law is a *complete* system.

So, according to the anti-positivists, the resolution of a legal dispute is never *indeterminate* as long the judge is always able to identify a *unique* and *correct* response within the law. This statement that the law is complete is of crucial importance to anti-positivism, as it is the final and most important step of the argument that it uses to *reject* the conclusion of legal indeterminacy. It is so important that anti-positivist law is largely reduced to a theory of adjudication, a theory of how to construct the judicial decision: it practically views law as an argumentative practice, wherein the most important development is the judicial process. Naturally this may give the impression that, according to anti-positivism, what makes the law *complete* is not that it is complete in and of itself, but rather that the anti-positivist *theories of law* (particularly its *theories of adjudication*) act as a *factor* of completeness (and the main factor) while constructing the judicial decision.

A closely related point is that the anti-positivist approach has largely focused on how to tackle the *hard cases* that arise in law, a test bed for theories of law and adjudication in observing how the judicial decision is constructed in legal practice. Indeed, Dworkian anti-positivism largely reduces contemporary positivism to an erroneous 'theory of hard cases' where Dworkin understands hard cases as those that arise in a legal system when a particular litigation cannot be clearly subsumed under a legal norm previously established by an institution, (and that in order for them to be settled) the judge has 'discretion' to decide the outcome of the case.[23]

However, Dworkin argues that where, in positivism, the judge has discretion to decide the outcome of the case, this implies that if one of the parties has a pre-existing right to win the case this idea (from the positivist point of view) is no more than a fiction. Indeed, when positivism settles a legal case in this way it is *creating* 'new rights': the judge has introduced new rights (through the interpretative solution, granting them to the party that wins the case), and) applying them, retroactively, to the case.[24]

From an anti-positivist point of view, the description of the judicial function in terms of discretion in *hard cases* does not give a satisfactory account of what adjudication is or of the structure of *judicial duty*.[25] The alternative for anti-positivism is to try to present and defend a better theory that more plausibly reflects legal practice.[26] To this end, Dworkian anti-positivism must construct the 'judge Hercules procedure': a model of an *ideal* judge, a paradigm of how to construct the judicial decision in *hard* cases, although equally valid for *easy* cases.[27] The *Hercules* procedure is also a *descriptive* and *prescriptive* perspective on adjudication, based on the idea of law as an *integral* social practice that takes into account the internal point of view of those who participate in the legal practice; in other words, arguments in the practice of law that develop within the judicial process while solving the legal *controversies* that arise therein.

In fact, the Herculean procedure constitutes one of the most important strategies that anti-

[23] Hart, *The Concept of Law* (n 8) 124-128.
[24] Dworkin, *Taking Rights Seriously* (n 15) 293 and 352.
[25] Dworkin, *Law's Empire* (n 7) 37-39.
[26] Dworkin, *Taking Rights Seriously* (n 15) 81-82 ff.
[27] Dworkin, *Law's Empire* (n 7) 352-354.

positivism (in its paradigmatic Dworkian version) uses to provide grounds for the *completeness* of the law, and to counter the thesis of its partial or complete indeterminacy. The basis of the Herculean procedure is the conceptual link between law and morality, based on a *theory of the sources of law* that includes both explicit statutory law and the implicit content of statutory law. This theory leads to the claim that the legal system has always envisaged a 'correct' response to every real or possible legal dispute. The result is that the judge can settle all cases in law.

As an argument generated by anti-positivism in favour of completeness, the unique *characteristics* of the Herculean procedure which provide an ideal model of judicial decision-making, do a great deal to vindicate the view of law as a full system. I refer to the following characteristics:

(1) Always settling a dispute *according to* the law; that is, through *arguments of principle*, and not with *political* or *opportunistic* arguments (discretional arguments).[28]

(2) The bivalent structure of the judicial decision, by virtue of which the Hercules procedure contains a 'bivalent' logical and conceptual scheme for judicial decision-making. The judge does *not* have a third possibility available in which a rule and/or principle neither applies nor does not apply, as this would constitute an 'indeterminate' response. In anti-positivist theories, *judicial bivalence* is a technical resource for the *completeness* of the law, even for confronting the most complex legal disputes.

(3) The *correct univocal* response that the law has for any present or future legal dispute.[29]

(4) The strength of *principles* in constructing the judicial decision: to bring about a situation wherein the law covers *all* cases (foreseen and unforeseen), the (implicit) *principles* of law play a very important role in the legal argument of the Herculean procedure. The use of principles for the completion of law has often been used in contemporary anti-positivism as, for example, Fuller's theory on adjudication when used to solve what he called problematic cases.[30]

(5) The 'unlimited capacity' of the interpretative resources of law as a factor in the completeness of law.[31]

By virtue of these premises, judges perform their duties with the supposition that for any legal dispute that citizens bring before them 'there is some solution inherent in law that is waiting to be discovered'. For this reason, the judge 'must never assume that the law is incomplete, inconsistent or indeterminate'; and when it appears to be so, he must realise that the defect is not within the law but rather due to the limited abilities of the judge himself to discover the solution that the legal system envisages for the particular dispute, whether by virtue of rules (explicit statutory law) or principles (implicit law). So the judge not only has no room to create law in the performance of his duties, but he must also justify what he believes the law *to be*. He must work to identify the *principles* that are objectively enshrined within the system, and if divergent ideas (*conceptions*) on these principles exist, he

[28] According to the opinion of Dworkin, *Taking Rights Seriously* (n 15) 82-83, 90-96 and 111.
[29] Dworkin, *Law's Empire* (n 7) 239-240.
[30] Fuller, *The Anatomy of Law* (n 11) 105 and 144; see also Dworkin, *Taking Rights Seriously* (n 15) 81 ff.
[31] Timothy AO Endicott, *Vagueness in Law* (OUP 2000) 99-100; Spanish translation: Timothy AO Endicott, *La vaguedad en el Derecho* (translated by Juan Alberto del Real Alcalá and Juan Vega Gómez, Dykinson 2006) 159-160; also, Dworkin, *Law's Empire*, (n 7) 44.

must decide which of these ideas corresponds to the best conception of these principles.[32]

Completeness in the area of the judicial decision means that every case compiled involves an opinion (the judge's decision) that maintains that one of the parties has, after the judge's assessment, the best legal argument and therefore wins the case within the legal dispute.[33] Thus, according to this anti-positivist position, if the judges did not follow the Herculean procedure as an objective and decisive procedure for resolving both hard and easy cases, it would be impossible for them to fulfil the professional duty required of them by the Rule of Law to *always settle* any legal dispute raised by citizens.[34] This is the *sine qua non* for satisfying the *fundamental right* of citizens to effective justice.[35]

However, two significant kinds of objections have been made to the anti-positivist view of adjudication. First of all, is it really possible (and not merely *conceptually*) to *totally* eliminate the indeterminacy that sometimes occurs in law? Or is this not a *useless* task, or even a not really *desirable* one, as Hart[36] or Timothy Endicott[37] claim, for any theory of adjudication, given the *structure* of the law? Another objection relates to the question of whether this doctrine can adequately respond to challenges such as the argument of *higher-order vagueness* (for example, the distinction between *clear cases* and *hard cases* is not always clear cut). According to Endicott, the legal theory of Dworkin –to which the thesis of the completeness of the law is fundamental– cannot respond to this argument.

4. THE DOCTRINE OF THE 'NORM AS A FRAMEWORK' AND LEGAL INDETERMINACY IN KELSEN

According to the criteria discussed in the text, Hans Kelsen's theory of law, a paradigm of legal positivism, should be classified as one of the legal theories that accept the incompleteness of law due to its indeterminacy. Traditionally, it has been claimed that Kelsen's thesis of the indeterminacy of law derives from his doctrine of the 'norm as a frame'.

However, I would like to briefly present a number of important points that question this affirmation. If these reasons are valid, it would be more correct to say that Kelsen's legal theory contains a 'thesis of the completeness' of law than a thesis of indeterminacy. Consequently, whilst Dworkin and Kelsen set out from opposing positions and move in different directions, both of them would arrive at the same conclusion that law is 'complete'.

The reasons I put forward can be resumed as one: Kelsen's legal theory does not really contemplate borderline cases, as long as it can settle all *present* and *possible* cases 'according to the law'. And it would seem meaningless to 'accept' the thesis of legal indeterminacy, while simultaneously 'denying' the existence of *indeterminate* cases in law. In my opinion, this is precisely what Kelsen's thesis of law does. I therefore question the traditional view

[32] Dworkin, *Law's Empire*, (n 7) 337-350.
[33] See Ronald Dworkin, 'Is There Really no Right Answer in Hard Cases?', in Ronald Dworkin, *A Matter of Principle* (Harvard University Press 1985) 120-145.
[34] See HLA Hart, 'El Nuevo Desafío al Positivismo Jurídico' (1980) 36 Sistema 14 (text from the talk given by the author at the Autonomous University of Madrid on the 29th of October 1979, translated by Liborio Hierro, Francisco Laporta and Juan Ramón de Páramo).
[35] See art 24 of the Spanish Constitution.
[36] HLA Hart, 'Postscript', in HLA Hart, *The Concept of Law*, (n 8) 251-253.
[37] Timothy AO Endicott, 'Law is Necessarily Vague' (2001) 7 Legal Theory 379-380; Spanish translation Timothy AO Endicott, 'El Derecho es Necesariamente Vago' (2003) 12, translated by Juan Alberto del Real Alcalá, Derechos y Libertades 180.

that Kelsen accepts the thesis of legal indeterminacy.

Four strong arguments serve to undermine the view that Kelsen's theory of law contains a thesis of indeterminacy. They are as follows:

4.1 The Argument for the Distinction between 'Individual' and 'General' Norms

From a Kelsenian point of view, 'a norm is individual if it decrees a once-only individually specified instance of behaviour to be obligatory'; when it dictates a unique and individually determined required behaviour; 'for example, the judicial decision'. And 'a norm is general if it decrees some generally specified behaviour to be obligatory'; when it dictates a required behaviour determined at a general level.[38]

From the Kelsenian perspective, the individual norm seems to correspond to *clear* cases. Logically, the Rule of Law provides judges with *precise*, and largely *objective* cases, and these are used to settle clear cases *in accordance* with *pre*-established law. In this type of court case the ruling must be made from *within* the law, in contrast to cases that can only be settled *discretionally*. However, these procedures are insufficient when the legal case has no solution *within* the legal system because it is a *borderline* case.

If we consider the fact that Kelsen equates the individual norm with the typical situations of *clear* cases, it is probably true that the general norm should correspond to those represented by *borderline* cases. However, this is where the contradiction arises in Kelsen's legal theory, as will now be explained.

4.2 The Argument of the 'Norm as a Framework', Based on the Above Distinction

As Hart observed, borderline cases are located in the area of indeterminacy or twilight zone of the area in which rules can be applied, for in any legal system there will also be cases that are not legally regulated.[39] These cases are then *indeterminate*.[40]

Borderline cases are characterised as being:

i) 'marginal cases', in that they are at the limit between the *clear* applicability or *clear* inapplicability of the law.

ii) 'doubtful cases', in that it is uncertain whether or not the law can be applied to them with certainty.

iii) '*indeterminate* cases' by virtue of the consequence of *indeterminacy* they produce when applying the law.

iv) 'hard cases', by virtue of the *complexity* involved in constructing the judicial decision in these indeterminate cases, which are either *incompletely* regulated or even *not regulated* in any sense by the legal system. This contrasts with the simplicity of constructing a decision in *clear* cases.

According to Endicott, *borderline* cases can be synthetically defined as those cases in which

[38] Hans Kelsen, *General Theory of Norms* (trans Michael Hartney, Clarendon Press 1991) 7 and 279.
[39] Hart, 'Postscript' (n 36) 272-273.
[40] Hart, *The Concept of Law* (n 8) 126-128.

one does not know whether the rule should be applied or not, and the fact that one does not know is not due to ignorance of the facts.[41] I use the nomenclature *borderline* cases or *marginal* cases, as this is the most common in legal theories that accept the thesis of indeterminacy.

Traditionally, the category *borderline* cases and the thesis of legal indeterminacy are common to positivist legal theories. However, an interesting case arises in this context: Kelsen's theory of law, considered as one of the paradigms of legal positivism. Kelsenian legal theory *supposedly* allows some type of a thesis of legal *indeterminacy*, but it also tries to make it compatible with the opposite thesis of the *completeness* of the law. In my opinion, stating one thing alongside its opposite its inevitably paradoxical. This contradiction arises because in Kelsenian legal theory, genuinely *incomplete* legal cases do not really arise. In fact, all legal cases that this legal theory considers can be resolved 'according to the law'. This seems to run counter to the very nature of an authentic borderline case.

The work of completing the law, and of consequently eliminating all legal indeterminacy, is performed by Kelsen through his theory of the 'norm as a framework'. For Kelsen, the legal system is a system of general and individual norms that are interrelated in accordance with the principle that law regulates its own creation. Every law of this system is created according to the prescriptions of another and, ultimately, according to the fundamental norm that constitutes the unity of the system.[42] In this regard, 'From a dynamic point of view, the decision of the court represents an individual norm, which is created on the basis of a general norm of statutory or customary law in the same way as this general norm is created on the basis of the Constitution'.[43] And, for this reason, the judge is always a legislator, even in the sense that the content of his rulings can never be exhaustively determined by a pre-existing norm from substantive law.[44]

Consequently, for Kelsen, a judicial decision 'is an act by which a general norm, a law, is applied; but at the same time it is an individual norm that imposes obligations on one or both of the parties in conflict'. So 'by resolving the dispute between two parties', what occurs is that 'the court actually applies a general norm of customary or statutory law'. And although, as Kelsen claims 'the court simultaneously creates an individual norm establishing a particular sanction to be imposed upon a certain individual', this creation does not mean that the judge is going 'beyond' the law. This is because 'this individual norm can be referred to general norms just as the law is referred to the Constitution'.[45] From this it can be deduced that the legal system can always provide the solution to any legal case from 'within' the law.

What seems to be clear is that the judicial decision in Kelsenian indeterminate cases, which are resolved using the notion of the norm as a framework, does not present exactly the same characteristics as those typical of the judicial ruling in genuine borderline cases: that is, those that do not just present themselves as indeterminate 'initially' but 'ultimately' turn out to be indeterminate. And for this reason they find no solution within the legal system. However, Kelsen does not consider this type of case. Moreover, from his point of view, when the judge resolves indeterminate (Kelsenian) cases, he is not 'stepping outside' of the law, but rather reaches a resolution from within the possibilities of the norm, and hence,

[41] Endicott, *Vagueness in Law* (n 31) 31-33
[42] Hans Kelsen, *General Theory of Law and State* (Transaction Publishers 2005) 124.
[43] ibid 144.
[44] ibid 145, 146, 148-149 and 166-168.
[45] ibid 125-131.

according to the law.
The question that now arises is whether a genuinely indeterminate case can be resolved according to the law, because then it would not 'ultimately' be an indeterminate case, but rather a hard case contemplated by the law (a pivotal case).

4.3 The Argument that the Kelsenian Legal Theory Refutes the 'Theory of Gaps' in the Law

Even where Kelsen accepts the notion of the judge as legislator, Kelsenian legal theory refutes the 'theory of gaps' in the law rejects the indeterminacy of the law: 'This theory [of gaps] is erroneous because it ignores the fact that the legal order permits the behaviour of an individual when the legal order does not obligate the individual to behave otherwise'.[46] The theory of gaps is based on ignorance of the fact that when the legal system does not impose any obligation upon an individual, his behaviour is permitted. And where an isolated legal norm cannot be applied, it is nonetheless possible to apply the legal system, and this is also an application of the law.[47]

Moreover, Kelsen believes that 'the theory of gaps in law –it is true– is a fiction; since it is always logically possible, although sometimes inadequate, to apply the legal order existing at the moment of the judicial decision'.[48]

4.4 The Argument for the 'Completeness' of the Law and the 'Consistent Positivism'

The argument for the 'completeness' of the law, which he advocates from a legal positivist position that he defines as 'consistent', is incompatible with the thesis of legal indeterminacy. Kelsen tries to safeguard first and foremost the postulate of legal positivism that every specific case must be resolved on the basis of current positive law; and, in his opinion, it is essential for a consistent positivist theory of law to show that the system of positive law contains this express or tacit authorization (to fill this or that gap).[49] But the idea that positive law can resolve any type of case does not seem very compatible with the thesis of indeterminacy.

5. CONCLUSION

For contemporary legal anti-positivism, the law is clearly complete in relation to laws and principles, because the legal system is always able to provide complete regulation through the interpretation of these laws and principles in relation to any real or possible case. This approach argues for the completeness of the legal system through a theory on the sources of created law, including explicit and implicit law, from which a solution to the Universe of real and possible cases can be provided. Non-regulated cases are seen as gaps, a sort of defect of the law, but one that can be fixed through a theory of interpretative adjudication, which is always able to provide a correct response to any legal dispute. It follows that the completeness of law is one of the theses that most clearly distinguishes anti-positivism (especially the Dworkian paradigm) from contemporary legal positivism. On the other hand, legal positivism claims that the nature of the legal practice is such that the law is *inconclusive*

[46] Hans Kelsen, *Pure Theory of Law* (translation from the 2nd German edition by Max Knight, University of California Press 1967) 246.
[47] Kelsen, *Pure Theory of Law* (n 46) 246-247.
[48] Kelsen, *General Theory of Law and State* (n 42) 149.
[49] Kelsen, *General Theory of Norms* (n 38) 131-132 ff.

as it is incomplete, and supports a (partial or complete) thesis of legal indeterminacy.

This has a consequence on the application of the law and on legal interpretation. For anti-positivists, completeness necessarily evokes a 'model judge' capable of resolving all current or future disputes, regarding which the law will never be indeterminate; and even if a case is initially indeterminate, this has no *significance* or *relevance* to the law, as the case can always be resolved through the interpretative methods supplied by the law itself. Legal positivism, by contrast, questions the fullness of the law by noting its open texture, the existence of borderline cases and the resulting conclusion of legal indeterminacy that gives rise to judicial discretion. The inevitable result is that the law is inconclusive as it is incomplete.

The disagreement between the two legal theories seems to reside in the 'ideal description' of the law given by anti-positivism and the more *realistic* description of the legal practice given by Hartian positivism and by the followers of this doctrine. In any case, both theories currently compete with each other to provide the best description of the legal system underlying the Constitutional Rule of Law.

However, this account of the differences between positivism and anti-positivism breaks down when we consider the thesis of indeterminacy in Kelsen and his doctrine of the norm as a framework. If the four arguments we put forward to consider his (apparent) thesis of legal indeterminacy are correct, they may put into question the claim that Kelsen's legal theory allows for legal indeterminacy. This is because it does not appear logical to accept a system of law that both 'indeterminate' and yet 'without gaps', as suggested by Kelsen. In other words, if we accept that Kelsen's legal theory allows both one thesis (legal *indeterminacy*) and its opposite (the *completeness* of the law), we must at least accept that Kelsen's legal theory contains a 'paradox' in relation to indeterminacy.

In my opinion, these considerations show that this legal theory is closer to the thesis of the *completeness* of law than it is to the thesis of the *indeterminacy* of the law. Or at least, they seem to seriously challenge the idea that this theory of law is really a thesis of indeterminacy.

Perhaps the issue can be clarified by distinguishing between cases that are indeterminate in the *Kelsenian* sense, which are not real borderline cases as they can be resolved *within* the law and *according* to the law; and cases that are indeterminate in the *Hartian* sense, which can only be resolved by 'stepping outside' the legal system, as they consist of cases that are really *not contemplated* by the law, or *incompletely* contemplated. Only these latter cases constitute genuine *borderline* or *indeterminate* cases.

It seems that contemporary legal positivism of the *Hartian* variety understands indeterminacy in terms of cases that are 'un-regulated' (or at least *incompletely* regulated) by the law. And indeterminacy from Kelsen's perspective refers, by contrast, to cases that are *regulated* by the law 'within the norm as a framework'. Therefore, whilst cases that are indeterminate in the Hartian sense *cannot* be resolved by the legal system, the indeterminate cases considered by Kelsen can *always* be resolved by the law and by the system of established sources by applying the doctrine of the 'norm as a framework'. Consequently, such cases never *ultimately* imply the indeterminacy of applicable law. So why is it claimed that Kelsen's theory of law contains a thesis of legal indeterminacy? It should also be considered that if Kelsen's legal theory does indeed contain a thesis of indeterminacy, it would be a thesis of indeterminacy that denies the existence of *indeterminate* cases, which seems meaningless.

Thus, if this reasoning is valid, it means that the legal theories of Kelsen and of Dworkin paradoxically converge in denying legal indeterminacy, albeit from radically different and opposing positions. It would also follow that both theories include a thesis of the completeness of the law. Both advocate a position contrary to Hart.